82-1332

No.

IN THE

Supreme Court of the United States

October Term, 1982

ANTONIO AVILES,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether or not the inclusion of a continuing conspiracy count which involved many transactions prior to the dates in the indictment allowed such prejudicial evidence of other crimes into evidence where the only convictions were for substantive counts.

2. Whether a statement in evidence by an important Florida law enforcement official that he was investigating the Petitioner two and a half to three years before and had received intelligence that Petitioner was supplying the whole Pensacola area with heroin and cocaine, was so prejudicial as to deprive Petitioner of a fair trial.

3. Whether the evidence below was so incredible as a matter of law as to make a conviction based on it one in violation of due process of law.

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Petitioner, ANTONIO AVILES, was convicted in the United States District Court for the Northern District of Florida, Pensacola Division, on March 25, 1982, of Distributing Heroin and Cocaine in violation of 21 U.S.C. Section 841(a)(1), two counts; Unlawful Travel in Interstate Commerce to Carry on an Unlawful Activity, in violation of 18 U.S.C.,

Section 1952, two counts; and one count of Attempt to Possess Cocaine with Intent to Distribute, in violation of 21 U.S.C. Section 846. He was sentenced to fifteen years in prison, a Special Parole Term of three years and a fine of $10,000.00 on Count Two. He was given an additional concurrent sentence of five years and a $10,000.00 fine on Count Three, and a consecutive sentence of ten years, a Special Parole Term of three years and a fine of $10,000.00 on Count Four. He was given other concurrent sentences which made his total sentence twenty-five years in prison. fines of $50,000.00 and a Special Parole Term of three years. The case was tried to a jury, Hon. Winston E. Arnow presiding, and his conviction was affirmed by the United States Court of Appeals for the Eleventh Circuit on November 10, 1982.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 U.S.C., Section 1251. No opinion was rendered by the Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions are whether Petitioner's right under the due process clause of the United States Constitution was violated in allowing evidence of other crimes and other conspiracies to be introduced in this case in a hearsay manner in which it was impossible for defense counsel to cross examine with regard to the facts of the situation. In addition, the question of whether Petitioner received a fair trial in view of the incredible nature of the government's testimony is also an issue.

STATUTES

21 U.S.C. Section 841 — Prohibited acts A - Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (2) of this section shall be sentenced as follows:

(1)(a) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000.00, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any otherprovision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000.00, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in additon to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

18 U.S.C. Section 1952 — Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --

(1) distribure the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

FACTS

At the outset of the trial, the United States Attorney and the Court recognized that a potential problem existed in the sense that there was some question as to whether the government could establish a conspiracy prior to the use of testimony of conversations with a co-conspirator named "Pete". The Court indicated that it would have to determine whether a conspiracy existed before the declarations were

admitted.

The first witness was TOMMIE SAVAGE, a twenty-nine year old resident of Pesnacola, Florida, who had received a twelve year federal prison sentence for the sale and possession of Heroin. After spending approximately two months in jail pursuant to his arrest in the federal jurisdiction in Pensacola, he worked out a plea to one count, got out of jail temporarily and agreed to cooperate with law enforcement. The object of the investigation, which was essentially made through the local sheriff's office, was Petitioner, ANTONIO AVILES, and another alleged dealer named "Pete". Savage admitted that he had been selling cocaine and heroin in the Pensacola area for three or four years, and he met AVILES because of a motorcycle that he was selling for one, JAMES LOCKE. Apparently, AVILES had a good deal to do with the buying, selling and repairing of motorcycles and automobiles. He also said that his friend, James Locke, was a source of heroin and cocaine, and the witness used to buy from Locke and sell it in the Pensacola area. The first time he saw AVILES was when he went with Locke to deliver a motorcycle. That was at the end of 1979 or the beginning of 1980, and on that

occasion he went to AVILES' collision shop on Hamilton Avenue in Brooklyn, New York. Savage said that Locke was with him and they had $1,000.00 with which they were going to try to buy some heroin. AVILES delivered cocaine, although they thought they were getting heroin. It then turned out that the answer was stricken because Locke did not hear any of the conversations regarding the narcotics in AVILES' presence, but later on in the testimony he said that Locke and he talked about narcotics in AVILES' presence. They got an ounce and divided it up and AVILES told them it was cocaine. Savage said that he did not bargain for cocaine and wanted his money back. AVILES did not accommodate him, but said that cocaine was all he could get and next time he would have heroin. Savage went back to Pensacola and sold the cocaine. That cocaine transaction was not charged in the indictment. A proper objection was made on the grounds that even if it was not offered for the truth, it outweighed any probative value. Objection was overruled and the witness was allowed to testify to another meeting he had with AVILES three or four weeks later in New York.

On that occasion he drove to New York with James Locke and they gave $1,900.00 to AVILES for an ounce of heroin. The price for the heroin was $1,500.00 and the additional $400.00 was for money owed on the previous cocaine transaction. Savage said that he got something from Locke but did not say that Locke gotit from AVILES and he testified that when they got back to Florida it turned out to be an ounce of sand.

There was really no evidence they got anything from AVILES because when Savage was asked if he saw where Locke got it from, Savage said that he did not.

The witness did not see AVILES for three or four months, but then he came to New YOrk in a van in another attempt to get heroin. It would seem that this entire testimony was preposterous, because it seems to ge quite improbable for a person to seek to buy heroin again after he had been ripped off and found sand as a substitute for narcotics and where he had lost $1,500.00. In any event, Savage said he got an ounce of cocaine at that time, but again said that he did not see Locke get it from AVILES. These questions and answers were stricken for the second time, but yet the jury still heard these

narcotics transactions, whereas they should not have been admitted at all. Savage said he didn't pay for the cocaine at that time but left the van with AVILES as collateral and signed the registration papers. He brought the ounce back to Pensacola, sold it, and then a month later returned to New York with Locke for the fourth time, again to buy heroin. There was a disagreement in New York because the van was never returned, another ludicrous situation, since the witness was seeking to buy narcotics after he had been ripped off for $1,500.00 and then apparently lost his van. They hung around for a few days waiting for drugs, then went back to Florida empty handed.

Savage made a fifth trip to New York three or four months later, around the beginning of 1981 to deliver some license plates and motorcycle tags. The witness said he bought a couple of ounces of heroin from AVILES on that occasion for $1,500.00 an ounce and an ounce for $1,600.00, but he was not absolutely sure, and since he did not have all of the money, the arrangement was that he would turn over the money after the merchandise was sold. That testimony seems a little incredible, because it is doubtful anyone could believe that the price for an ounce of

heroin is almost the same as the price for an ounce of cocaine. At any rate, he paid nothing for the drugs, AVILES gave him money to get back to Pensacola and Savage said he went back to Florida and sold the drugs on the street. In fact, he made a very nice profit on that transaction. Thereafter, Savage said he went back and forth to New York at least once or twice a month to meet AVILES and buy heroin. He brought motorcycle tags or car tags to AVILES, took back narcotics, and he made about five of these trips in total, not counting the first five trips he described in detail. He also said that with regard to these trips, on one or two occasions he actually met the person from whom AVILES got the drugs, a person named "Pete", and he even bought directly from "Pete" on occasion. The witness said that AVILES got the drugs from "Pete", but there is no evidence to indicate there was any sort of partnership or conspiracy between them.

Savage also said that he bought heroin from AVILES in Pensacola where AVILES had a house on P Street. He siad that he made about five or six purchases in Florida which mostly consisted of heroin. There was a side bar conference concerning

the conversations of "Pete", because the Court was concerned that if "Pete" was not involved in a conspiracy but was an independent person, even though he was the supplier, the statements could not be admissible.

The Court viewed the evidence as establishing that Savage made purchases directly from "Pete" and there was no conspiracy established. "Pete" did not enter the picture until the last nine purchases were described and there was no time reference described with any degree of specificity. In addition, the evidence seemed to indicate that he did not do business with "Pete" until he stopped doing business with AVILES in New York, and the business being done in Pensacola seemed to be with AVILES alone, so that no conspiracy was established and the Court ruled that there was no evidence that the three men agreed to do something illegal. It had not been established that each man knew exactly what the other was doing.

Savage then testified that he was arrested on July 27, 1981, when he was caught with an ounce of cocaine that he had obtained from AVILES. On the occasion of his arrest the police seized about thirteen ounces of cocaine from his house, as well as

thirteen ounces of heroin. He got out on bail about a week later and then was arrested again on Federal charges which led him to agree to work with the government. In connection with that agreement, he pleaded guilty to one count of distribution of heroin, and pursuant to his working with the police he went to AVILES' house in October or November at their direction. The first meeting involved talking about a car deal, but the witness advised Agent Kiker that AVILES was in town. Savage met with the local police and was given a body transmitter and went back to AVILES' house that evening, where he engaged the Petitioner in a drug conversation. However, every time he tried to bring up the subject of drugs, AVILES would talk about something else. AVILES seemed to be unwilling to be drawn into any kind of drug deal. Savage didn't get any drugs from AVILES that evening, nor could he make plans to see AVILES because AVILES told him he had no drugs in any event. He visited AVILES the next day, but there was also no drug transaction. Savage kept boing back and forth because he was working on a motorcycle and there was a garage next to AVILES' house. AVILES apparently had an interest in the garage, so there was a good

reason for the men to see other aside from drug transactions. Savage kept going back and forth on many occasions but did not obtain any drugs from the Petitioner. It was not until October 17, 1981 that Savage said he got one ounce of heroin. In fact, he met AVILES three or four times and Petitioner said he had no drugs, but the witness kept asking AVILES for some. Savage told AVILES that he had $700.00, so finally AVILES told him to go get the money, and when Savage returned with it, Petitioner allegedly gave him an ounce of heroin in a plastic sandwich bag. Savage said he saw AVILES take the narcotics from under the dashboard of an old Corvette parked in the garage. The $700.00 represented a deposit and there still would be $4,500.00 due. Savage left the premises, met with the police and gave them the heroin. He had met with them before he went to AVILES and had obtained $700.00 from them to pay for the drugs. He also said that during this transaction he was wearing a transmitter which was monitored by the police. The witness identified a photograph taken which was allegedly taken that day, which showed him and the Petitioner standing near each other in the vicinity of the garage.

Savage continued his testimony by saying that he did not see AVILES for quite some time and, in fact, the next time was sometime in November, also at the P Street address. They got into an argument with respect to Savage having damaged the Corvette, and the next day they met again. Savage complained that the heroin he had gotten from Petitioner was not good. Savage said AVILES told him if he wanted to return the heroin he could get his money back. There was no drug transaction at that time, but Savage said that next time he got drugs from AVILES was in December, still under police direction. The specific date was December 4th and the transaction occurred again at the house on P Street. Savage said he got an ounce of cocaine from Petitioner on credit. He returned that evening with $800.00 which he gave Petitioner as partial payment. The $800.00 was given to him by the Sheriff's Department. That night AVILES told him to get some baggies and a scale, and after Savage did what he was told, AVILES weighed out cocaine, gave it to Savage and Savage turned it over to the Sheriff's Department.

Savage testified that he met Petitioner again around the 20th or 21st of December. There was an

argument because Savage claimed that Petitioner was supposed to bring drugs and Petitioner denied it. Savage supposedly complained that he still had a half ounce of cocaine left and AVILES said that if he would return it he could get his money back. More pictures were introduced showing the men together and the witness completed his direct testimony.

On cross examination Savage admitted having possessed stolen property in addition to his narcotics dealings, and he also said that James Locke was his heroin suppleir before he met Petitioner. When he was initially arrested on the Federal charge, his bail was $350,000.00, but once he began cooperating with the D.E.A., it was changed to a personal recognizance bond. He again reiterated that when he met AVILES in Florida, AVILES did not have any drugs and he said that on the first occasion when he bought drugs from the Petitioner, where he gave him the $700.00, although the police searched him in his own van before he went to Petitioner, he said he still could have hidden drugs in the van if he wanted to, which would not have been found by the police.

The next series of witnesses were all employees

of the Sheriff's Department who basically observed and monitored the meetings between Savage and the Petitioner. BILL DAVID, JR. took the surveillance photographs when Savage met Petitioner on October 17th, and various photographs were identified.

The next witness was Lt. L.A. DAVIS of the Sheriff's Department, who was in charge of the narcotics unit, and he said that the first time he began to investigate the Petitioner's activities was approximately two and one-half to three years prior to October, 1981. He said that they had good intelligence that a man named "Tony", who lived in Brooklyn, was apparently in Pensacola with heroin and cocaine. The witness said they maintained their investigation file and then when Tommie Savage began cooperating, the investigation took shape. The confidential information that AVILES was apparently the source of narcotics was not obtained from Savage, but was obviously hearsay from an unidentified source. This evidence was admitted into the trial obviously for its truth since there were no limiting instructions.

Thereafter, Savage agreed to meet AVILES to try to deal in drugs and the first meeting on October 12th was monitored because Savage was wearing a body

transmitter. There were no drug conversations, but there was another meeting which was also recorded on October 17th, and that was when the $700.00 was given to Petitioner for the narcotics. The witness identified the photograph of the two men, but he said that the two of them went into the garage area so that they could not hear anything on the tape recorder. The only thing that could be discerned was that Petitioner told Savage there was a $5,000.00 package there and Savage was to go get the money. Savage left the house, drove his van away and gave the police a plastic bag containing a white powder which turned out to be narcotics. The police then gave Savage $700.00, which he went back and gave Petitioner. The officer said that on this occasion, although the transmission was very poor and they could not hear the entire conversation, they could hear Savage ask how much cut it would take and AVILES said it should be about twelve times. The witness said he listened to the tape recorder but the quality was very poor because the acoustics in the garage were very bad and the sound echoed. They sent the bag to the laboratory, where it was identified as heroin, and they also asked the laboratory to process the bag for fingerprints.

Another investigator with the County Sheriff's Office, BARRY MAINER, also participated in the surveillance. His testimony was basically the same as the other witnesses in describing the two men being in each other's presence. He identified the photographs and participated in the surveillance of December 4th and he said that there were other people in the garage, so that it was hard to tell whether they were all working on cars, since he kept seeing the hoods and trunks of different vehicles being opened and closed.

Another witness, JOEL MOONEYHAM, also a participant in the survillance, said that he took possession of the drugs given to him by Savagg on December 4, 1981, and also said he searched Savage and his vehicle on December 4th before he met with AVILES and found no contraband. He also identified the photographs and listened to the conversation which came over the body transmitter. He heard Petitioner ask Savage what he did with the October 17th package, and Savage told him it had been scattered in two or three places. That was the only reference to narcotics, the rest of the conversation being concerned with automobiles and motorcycles. The rest of his testimony was

basically the same as the other police testimony, and he testified with regard to the chain of custody concerning the plastic bag of narcotics and the tape recordings themselves. The witness admitted, as a previous witness had, that the quality of the tape recordings was poor at best, and the reason was because the Sheriff's Department bought cheap tapes. "Pete's" name was not brought up except during one conversation where Savage told Petitioner he understood "Pete" was going to send a package from New York, but Petitioner denied that "Pete" ever said anything to him along those lines.

The jury was then taken out of the courtroom and the witness was questioned about advising Petitioner of his Miranda rights on the occasion of his arrest. The witness said that he told AVILES He had a right to remain silent, that anything he said could be used against him in a Court of law, that he had a right to have an attorney present, and if he couldn't afford an attorney one would be provided to him, and that Petitioner refused to make any statement, except that he said, "If you play, you pay." He also said if he had to do his time, he would do his time.

The Court ruled that the statements were volun-

tary and the jury returned to the courtoom. The witness then testified again before the jury as to advising Petitioner of his rights and he told the jury the statement that AVILES had made.

REGGIE JERNIGAN, a Corrections Officer, identified the fingerprint card of the Petitioner that was used when he was arrested and his fingerprints taken, and WILLIAM J. WARNER,a D.E.A. agent, identified the bags of contraband and the transfer of the bags to the laboratory.

Thereafter, OTIS W. GARRETT, a fingerprint expert with the Department of Law Enforcement, Pensacola Crime Laboratory, was qualified as an expert. He testified with regard to two fingerprints taken from one of the bags which contained the cocaine. He described his testing procedure and said that the fingerprints on the bag were made by the same person whose fingerprints were on Exhibit 17, the fingerprint card that was used to take Petitioner's fingerprints.

On cross examination he said that he found fourteen identifiable comparisons on one print and sixteen on another, but he advised that in many cases he had found one jundred identifiable characteristics. He said that the standard for the State of Florida was

ten comparable characteristics, but it was not a hard and fast rule.

MARION ESTES, another employee of the Crime Laboratory, an expert in chemistry, identified one of the exhibits as twenty-seven and a half grams of cocaine and the other exhibit as heroin with a purity of about seven and one-half percent.

There was a motion for a directed verdict, which was denied, especially since there was no proof that Savage, AVILES and "Pete" were co-conspirators, and ther was also argument that there was no evidence that Petitioner attempted to distribute the narcotics.

Thereafter, the Petitioner's attorneys played the tapes forthe jury, inasmuch as they contended that there was nothing on the tapes that could be understood. The tapes were actually played for the jury.

The defense called a series of witnesses who were present at the house and the garage on the day of the alleged narcotics transaction, but they all testified either that they did not see the two men together or that there were no narcotics transactions that took place. They also testified as to Savage's reputation in the community as a liar.

ERNEST McMILLIAN owned a club in Pensacola known as The Big Train, and knew Savage for about two to threeyears. He said that Savage's reputation in the community for truth and veracity was that Savage was a liar. He also said that he was at the garage on P Street on October 17, 1981, working with cars and did not see Savage and AVILES together on that date. He also said that he has never seen AVILES have any drug dealings whatsoever.

JOHN LEE JOHNSON also knew both Savage and AVILES and he was aware that Savage's reputation in the community was bad as far as truth was concerned. He, too, was at the garage on October 17th during the time when Savage was supposed to be there and he did not recall seeing the men together, nor could he recall seeing Savage at all that day. He also never heard of or saw Petitioner selling drugs.

MAJOR LOWE also averred that Tommie Savage had a bad reputation for truth and veracity. He was a friend of both men and was at the garage on October 17, 1981. These men were apparently all part of a motorcycle club and although he recalled seeing Savage pass buy that day, it was not for a very long time and Savage and AVILES were never alone together.

Petitioner never talked to him about drugs and he never knew Petitioner to possess or deal in drugs. On the other hand, he did know Savage as being a drug dealer. This witness was shown the pictures taken by the police, but he said he was not sure that the two men were actually Savage and AVILES because the pictures were not that good.

Both sides rested. The charge was shown to the attorneys and no objections were made. After summation, the Court charged the jury, again without objection, and after the jury began deliberation, at their request, with the consent of both sides, a tape player was admitted into the jury room and the jury again listened to the tapes.

The jury found the Petitioner not guilty of Count One, the conspiracy count, and found him guilty of Counts Two, Three, Four, Five and Six.

The next day Petitioner received a total sentence of twenty-five years in prison, $50,000.00 in fines and a three year Special Parole Term.

POINT I

THE INCLUSION OF THE CONSPIRACY COUNT IN THE INDICTMENT BELOW, WHERE NO BASIS FOR IT EXISTED, PREJUDICED PETITIONER.

This case involved a six count indictment, the first count being one which charged Petitioner of conspiring to distribute heroin and cocaine in Florida from August 1, 1979 until September 1, 1981, a period of about two years. The remaining five counts dealt specifically with exact dates on which the Petitioner was alleged to have sold a controlled substance to Tommie Savage, the heroin dealer who became a government informant. These dates were October 17, 1981, December 4, 1981 and December 21, 1981. It would have been quite sufficient and would have made for a very clean and unencumbered trial if the Petitioner had merely been charged with the last five counts which would have accused him of selling narcotics on the three dates in question and the government could have presented its informant witness as well as other evidence it claimed to have.

It is respectfully submitted that by including the conspiracy count, a count concerning which there was insufficient evidence, the whole trial became so tainted with evidence of a long standing unprovable

conspiracy and evidence of other crimes, that the Petitioner was deprived of a fair trial. The ultimate verdict of the jury really bears out the argument of Petitioner, in that they acquitted him of the conspiracy count, but convicted him of the remaining five counts. It is entirely reasonable to assume that even though they acquitted Petitioner of the first count, the evidence that they heard concerning that conspiracy, concerning all sorts of trips that Tommie Savage made to New York and concerning other crimes and bad acts of the Petitioner must have affected the jury's thinking when it considered the other five charges.

As we have discussed in the Facts portion of this writ, Tommie Savage was allowed to testify not only to the many trips he made to New York in orde- to buy cocaine and heroin from Petitioner, but he was also allowed to bring in dealings he had with one, "Pete", who he claimed was an associate or co-conspirator of the Petitioner, and he was allowed to discuss one, James Locke, who accompanied him to New York and who Savage said was his supplier of heroin before AVILES even came into the picture. Conversations and conduct on the part of Locke and on the part of "Pete"

were related to the jury and the Court initially made statements it was of the opinion that no conspiracy had been proven and that these conversations should be inadmissible in the first case. The first time that the witness testified that he got an ounce of cocaine from Locke but there was no connection with AVILES, the Court struck the answer, but it is questionable as to whether the jury could have disregarded it. In Chambers, the Court was quite concerned about whether or not a conspiracy had been established, and the Court said that it could not really understand the evidence too well due to the difficulty in understanding the witness, but the evidence seemed to indicate at the most that Savage was buying independently from Petitioner and independently from "Pete". The evidence also established that the New York dealings and the Florida dealings were different because the testimony of Savage indicated that in New York he stopped doing business with AVILES and continued with "Pete", but in Florida he only did business with Petitioner, and that probably did not involve a conspiracy. It would seem that the multiple conspiracy doctrine discussed in Kotteakos v. United States, 328 U.S. 750 (1946) would apply because the proof showed

multiple conspiracies at the very best rather than one and proof of multiple conspiracies when one is only alleged should result in a dismissal of the indictment. To separate the conspiracies from the substantive counts would seem to be too far fetched and hard to deal with once the conspiracy was alleged and so much testimony was adduced with regard to the transactions before October 17, 1981.

The Court also advised the government that it could not prove a conspiracy by hearsay. The Court should have dismissed the conspiracy count at the close of the government's case and its omission to do so allowed the jury to consider all of the evidence adduced with regard to that count. Therefore it had the evfect of allowing the jury to discuss that evidence and discuss all of the many trips to New York, which as we will discuss later on, seem preposterous in themselves, so that even though the jury acquitted Petitioner of the first count it had a serious spill-over effect on their consideration of the rest of the charges against Petitioner.

There was no evidence that the Petitioner joined into a conspiracy, adopted its purposes or in any way had a stake in its outcome. United States v. Borelli,

336 F.2d 376, cert. denied, sub. nom. Cinquergrano v. United States, 379 U.S. 960 (2nd Cir. 1964); United States v. Aviles, 374 F.2d 179, cert. denied sub. nom. Evola v. United States, 362 U.S. 974 (2nd Cir. 1960); United States v. Projansky, 465 F.2d 123 (2nd Cir. 1972); Direct Sales Company v. United States, 319 U.S. 703 (1943).

POINT II

THE EVIDENCE OF OTHER CRIMES AND OTHER BAD ACTS ON THE PART OF PETITIONER DEPRIVED HIM OF A FAIR TRIAL.

The law is clear that it is improper to introduce evidence of other crimes in a trial in which the other crimes are not specifically relevant. Corallo v. United States, 375 U.S. 835 (1963). Testimony which shows evidence of other crimes should be permitted only with great caution and then only if these crimes are specifically relevant and are introduced for purposes other than to show a defendant's disposition to commit crimes. Thus, traditionally, prior criminal activities are admissible only when it is necessary to establish motive or intent, absence of mistake, identity, commonscheme or other valid issues. United States v. Tramaglino, 197 F.2d 928, cert. denied. 344 U.S. 864 (2nd Cir. 1952); Helton v. United States,

22 F.2d 338 (5th Cir. 1955); United States v. Chiarella, 184 F.2d 903, modified 187 F.2d 12, reargument denied, 187 F.2d 870, vacated, 341 U.S. 946, cert. denied, 341 U.S. 956 (2nd Cir. 1950).

In the case at bar, the jury heard evidence of all sorts of narcotics dealings under the guise of throwing in an improper conspiracy count which the government should have known was not supported by credible evidence including the Petitioner in a conspiracy. In addition, there were other specific crimes testified to by the government witness, Tommie Savage, which were not part of the conspiracy and another government witness also improperly indicated to the jury that the Petitioner had been a target of their narcotics investigation for many years before the crimes for which Petitioner was convicted.

In cases of this sort where many officers participate in surveillances of supposed narcotics dealers, there is always a danger that the defendant will be prejudiced just simply by the number of law enforcement witnesses who testify, even though their testimony is cumulative and the testimony does not specifically relate to any of the elements of the

crime. That type of situation is presented in this case because many police officials simply testified to the same thing, that they saw Savage and AVILES in a particular location, that pictures were taken, but that they really couldn't be a witness to any narcotics transactions because even the tape recording that they were monitoring was of terrible quality. The extreme efficiency of this police operation is highlighted by the fact that one of the police officials explained the poor quality of the tape by testifying that the reason was because the Florida Sheriff's office involved used "cheap tapes".

In any event, to make matters worse, the head of the whole narcotics investigation, L.A. DAVIS, a Lieutenant with the Sheriff's Department in charge of the narcotics unit, was allowed to tell the jury that he began to investigate Petitioner's activities approximately two and a half to three years ago. He added to the prejudice of the situation by stating that they had been receiving intelligence, not from Tommie Savage, that someone named "Tony" lived in Brooklyn and was supplying the Pensacola area with heroin and cocaine. The Sheriff's office maintained an investigation file on Petitioner and

and then Tommie Savage came into the picture. Petitioner views this as the most serious error at the trial and argues that evidence of this nature is in and of itself subject to reverse.

It is respectfully submitred that this type of testimony is impossible to counteract and must have had a very chilling effect on the jury. A law enforcement officer testified as to hearsay he had received from sources other than the witness, Savage, that AVILES was supplying the whole Pensacola area with cocaine and heroin. That type of testimony obviously implied that AVILES was a major dealer, that he was the source of all or a substantial portion of narcotics traffic in Pensacola and this type of opinion and hearsay testimony, from a confidential source, coming from a lieutenant in the Sheriff's office, was obviously taken by the jury as very important. In addition, there was no way defense counsel could have cross examined or checked into the reliability of such evidence because there was no witness on the witness stand who testified to these things from knowledge. Such testimony might have been appropriate on a suppression hearing,

but certainly not before a trial jury where the Petitioner faced specific charges.

We submit that this testimony alone, without more, is sufficient to require a reversal of this conviction. It told the jury that Petitioner was supplying the entire area with narcotics, obviously another crime not charged in the indictment, and there was no way he could counteract the effect this testimony had on the jury. In addition, Tommie Savage was allowed to testify to all of the specific cocaine and heroin transactions he allegedly had with AVILES on approximately fifteen occasions where he came to New York, such occasions having nothing to do with the substantive counts in this indictment. It was bad enough that Savage testified that Petitioner sold him heroin and cocaine, but he also testified to other crimes that Petitioner committed. Such other crimes would amount to larceny and fraud and would reflect not only on Petitioner's character but probably also on the character of the witnesses he called who testified that Petitioner had never dealt in narcotics. Savage testified that on the second transaction with AVILES, when he was buying narcotics, AVILES took money from him and supposedly

gave him heroin, but AVILES ripped him off because the substance turned out to be nothing but an ounce of sand. On a later date when Savage again bought from Petitioner, Savage left his van as collateral, but when he returned to New York thereafter, it turned out that AVILES had apparently taken his van and sold it or disposed of it. These two incidents represented times when AVILES took advantage of Savage, ripped him off and certainly were things that a jury should not have heard. It is most respectfully submitted that the testimony of Savage to the two rip-offs, the testimony of Savage with regard to all of the other cocaine and heroin transactions having nothing to do with the last five counts of this indictment, and most important, the testimony of Lt. DAVIS with regard to the other information that the police had about AVILES combined to place matters before the jury which were improper and the effect was to deprive Petitioner of a fair trial.

CONCLUSION

THE PETITION OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5458
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO AVILES,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Florida

Before HILL, KRAVITCH and HENDERSON, Circuit Judges

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

November 10, 1982

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5458
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO AVILES,

Defendant-Appellant

Appeal from the United States
District Court for the Northern
District of Florida

(November 10, 1982)

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

PER CURIAM:

After a jury trial, Antonio Aviles was convicted of distribution of a controlled substance, 21 U.S.C. Section 841(a)(1) (two counts); unlawful travel in interstate commerce to facilitate unlawful activity, 18 U.S.C. Section 1952 (two counts); and attempt to possess with intent to distribute a controlled substance, 21 U.S.C. Section 846 (one count). At the same trial, he was acquitted on a sixth count, which alleged a conspiracy to distribute in violation of 21 U.S.C. Section 846. Aviles now appeals the judgment of conviction.

The facts pertinent to his appeal may be briefly stated. The government chief witness at the trial, Tommie Savage, had himself been convicted of drug trafficking. Savage's testimony focused on two distinct series of alleged transactions. First, he described a number of trips he made from Pensacola, Florida, to New York City over a two year period. According to Savage, he had traveled to New York on several occasions, both alone and with an accomplice, to purchase heroin and cocaine from the defendant. He also testified to meetings with another dealer, identified only as "Pete". Apparently, Pete was

present during several earlier transactions between Savage and Aviles, and later, Savage made purchases from Pete without the defendant's knowledge. Those various alleged activities formed the basis of the conspiracy count of the indictment.

Savage also testified about a similar series of drug purchases from Aviles occurring in Pensacola, which provided the factual basis for the other five counts. At the time of these later transactions, Savage had been convicted and had commenced cooperating with the police. Several law enforcement officials, who observed and monitored those meetings, corroborated Savage's account. Additionally, a fingerprint expert testified that Aviles' prints matched prints on the bags of drugs Savage gave to police immediately after his meetings with the defendant.

Most of the defendant's assignments of error relate to the count for which he was acquitted — the conspiracy count. He claims that several alleged errors concerning the charge, and the evidence proffered to prove it, had a prejudicial spill-over effect on the jury's consideration of the substantive counts.[1/]

In effect, he urges that "cross-count prejudice" tainted his convictions on the substantive counts. See United States v. Parr, 509 F.2d 1381,1383 (5th Cir. 1975). "We have recognized the possibility of such prejudice, at the same time indicating that only in an unusual case would it be grounds for reversal." 509 F.2d at 1383-1384, citing United States v. Meriwether, 486 F.2d 498,504 (5th Cir. 1973), cert. denied, 417 U.S. 948, 94 S.Ct. 3074, 41 L.Ed.2d 668 (1974).

1/ More specifically, Aviles maintains there was a fatal variance between the indictment, which charged a single conspiracy, and the proof, which he contends suggested multiple conspiracies. He also disputes the district court's denial of his motion for judgment of acquittal on the conspiracy count. Similarly, he argues that the lack of sufficient evidence rendered the indictment on the conspiracy charge improper in the first place. Finally, reasoning that he should not have been indicted for conspiracy, he asserts that evidence of the New York transactions was inadmissible under Fed. R. Evid. 404(b)

Aviles does not cite any unusual circumstances in this instance which would warrant a reversal. He has presented "no specific evidence of prejudice or confusion on the part of the jury." United States v. Moynagh, 566 F.2d 799,805 (1st Cir. 1977), cert. denied, 435 U.S. 917, 98 S.Ct. 1475, 55 L.Ed.2d 510 (1978). The conspiracy count focused on alleged transactions completely distinct in time and place from those charged in the substantive counts. See Parr, 509 F.2d at 1384; United States v. Febre, 425 F.2d 107, 113 (2nd Cir.), cert. denied, 400 U.S. 849, 91 S.Ct. 40, 27 L.Ed.2d 87 (1970). The trial court also instructed the jury to consider each count of the indictment separately. See Meriwether, 486 F.2d at 504; Moynagh, 566, F.2d at 805.Under these circumstances, we find no indication that consideration of the conspiracy count infected the convictions on the other five counts. See Meriwether, 486 F.2d at 504.

Moving to his convictions on the five substantive counts, Aviles asserts that testimony by one of the investigating officers was improperly admitted, both because it pertained to prior bad acts and because it was hearsay. In his testimony, Lieutenant L.A. Davis remarked that he had received information three years

earlier, from an undisclosed source, on Aviles' drug activities in the Pensacola area. The defendant's attempt to exclude this evidence comes too late. He did not object to the question, or move to strike the response, during the trial as required by Fed. R. Evid. 103. Therefore, the objection may not be raised on appeal absent plain error. E.g., United States v. McLeod, 608 F.2d 1076,1078 (5th Cir. 1979). Finding no plain error, we do not address the admissibility of the testimony. Nevertheless, in view of the extensive evidence presented at the trial respecting the specific drug transactions, the admission of Lieutenant Davis' passing comment, even if error, was harmless.

Aviles also claims that the government presented insufficient credible evidence to support a guilty cerdict on the five substantive counts. The gist of his argument is that Savage's testimony is unworthy of belief as a matter of law. In evaluating a challenge to the sufficiency of the evidence, we must, of course, view the facts in the light most favorable to the government. Glasser v. United States, 315 U.S.60,62 S.Ct. 457, 86 L.Ed. 680 (1942). This inquiry requires accepting all reasonable inferences and credibility

choices that tend to support the jury's verdict. E.g., United States v. Mitchell, 666 F.2d 1385 (11th Cir.) cert. denied, ___U.S.___, 102 S.Ct. 2943, 73 L.Ed.2d 1340 (1982). Furthermore, since the jury is the "ultimate arbiter" of credibility, "(o)nly when testimony is so unbelievable on its face that it defies physical laws should the court intervene and declare it incredible as a matter of law." United States v. Lerma, 657 F.2d 786 (5th Cir. 1981), cert. denied, ___U.S.___, 102 S.Ct. 1279, 71 L.Ed.2d 463 (1982). Contrary to Aviles' contention, a rational jury could easily and justifiably have believed Savage's account of the transactions. Moreover, law enforcement officials substantially corroborated his story. Confronted with such testimony, "a reasonable trier of fact could find that the evidence establishe- guilty beyond a reasonable doubt." United States v. Bell, 678 F.2d 547,549 (5th Cir., Unit B 1982) (en banc). Accordingly, the defendant's challenge to that evidence must fail.

Finally, Aviles alleges that the judge sentenced him one day after the return of the verdicts, thereby precluding sufficient time to prepare a proper pre- sentence report. This statement of the sequence of

events is in error. As the government points out, the record reveals that the jury rendered its verdict on March 4, 1982 and the court did not impose sentence until March 24, 1982. In that three-week interim, the customary presentence investigation was conducted. This contention, like the defendant's other assignments of error, lacks merit. The conviction is therefore

A F F I R M E D .